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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 131

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADA J. ALBERTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review the judgment entered on March 20, 1950, in the above case by the United States Court of Appeals for the District of Columbia Circuit, which modified an order issued by the Federal Trade Commission and affirmed the order as thus modified.

OPINION BELOW

The opinion of the court of appeals (R. 64-77) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1950 (R. 77). The jurisdiction of

this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Respondents, in advertising certain food and drug preparations, have claimed that they are useful as a remedy for certain general symptoms or conditions. The Federal Trade Commission prohibited respondents from representing the preparations as a remedy for these symptoms unless the advertisements include statements (1) that the preparations are efficacious only when the symptoms are due to a particular cause, and (2) that more frequently than not these symptoms result from other causes as to which the preparations have no utility. The court of appeals set aside the second requirement as beyond the power of the Commission.

The questions presented are:[1]

1. Whether the court of appeals adopted an unduly narrow construction of Sections 12 and 15(a) of the Federal Trade Commission Act, which specifically empower the Commission to prevent dissemination of any false advertisement likely to induce the purchase of food or drugs.

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[1] As stated *infra*, pp. 7-8, another provision of the Commission's order prohibited respondents from advertising one of its products as being of value in the treatment of insomnia, etc., "unless such representation be expressly limited to claims of value made for the preparation *under the principles of the homeopathic school of medicine* in the treatment of" such symptoms (R. 52). A question is presented herein as to whether the court of appeals erred in deleting the italicized words from the Commission's order.

2. Whether it was irrational for the Commission to conclude that respondents' advertisements would be misleading in a material respect unless containing the disclosures required by the Commission's order.

3. Whether the Commission exceeded the limits of "an allowable judgment" in determining the prohibitions requisite to prevent respondents from continuing to disseminate false advertisements.

STATUTE INVOLVED

Sections 12 and 15(a) of the Federal Trade Commission Act, as added to that Act by the Wheeler-Lea Act of March 21, 1938, 52 Stat. 111, 114, 116, 15 U.S.C. 52, 55(a), provide as follows:

> Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.
>
> (b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice

in commerce within the meaning of section 5. [15 U. S. C. 52.]

* * * * *

Sec. 15. For the purposes of sections 12, 13, and 14—

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of the formula showing quantitatively each ingredient of such drug. [15 U. S. C. 55a.]

Section 5 of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or prac-

tices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Certain copartners doing business under the name of Alberty Food Products, who will be referred to as respondents, sell and advertise in interstate commerce various food and drug preparations (Fngs. 1-3, R. 33-35). In a proceeding under Section 5 of the Federal Trade Commission Act charging respondents with violating the section by falsely advertising their preparations (R. 5-12), the Commission found, on the basis of stipulated facts (R. 15-29), that respondents had falsely advertised 16 different preparations (Fngs. 2-3, 61, R. 34-35, 46).[2] It entered an order which set forth, as to each preparation, the representations which were prohibited (R. 48-53).

Respondents' petition for review of the order attacked only parts of the prohibitions directed against four products (R. 1-4). The principal ground of attack, which involved all four products, is illustrated by the facts with reference to Oxorin Tablets. They were advertised as giving relief to those who are "weary," "tired," "run-down," etc.

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[2] The Commission's complaint, findings and order are reported in full in 44 F.T.C. 475.

(Fng. 16, R. 35-36). The findings were that the tablets do not benefit a condition of lassitude as thus described unless it is due to simple iron deficiency anemia, and that this condition is "much less frequently" due to such anemia than to other causes (Fngs. 19, 24, R. 36, 37). The Commission further found that recommendation of a preparation as a remedy for a particular symptom or condition suggests that it is due to a cause for which the preparation is beneficial, and, if in fact the causes of the described condition are numerous and the preparation is beneficial only when the condition is due to a particular cause, the representation is misleading unless accompanied by an "appropriate disclosure" (Fng. 61, R. 46-47). Respondents did not question any of the Commission's findings.

The order which the Commission entered prohibited representing Oxorin Tablets as benefiting a condition of lassitude "unless such representation be expressly limited to symptoms or conditions due to simple iron deficiency anemia *and unless the advertisement reveals that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it*" (R. 50). Petitioners attacked the italicized language and the court of appeals struck it from the order (R. 2-3, 69, 77).

The court of appeals, in an opinion by Judge Prettyman, held that the Commission has no power,

even under "the broadest possible concept" thereof, to compel an advertiser to "tell the public that his product is more frequently valueless than it is valuable" (R. 66). The Court appears to have reached this conclusion largely upon the ground that such power would be tantamount to power to destroy the very objective of advertising—inducement to purchase (R. 66, 67-68).[3] The court further expressed the opinion that the "derogatory addendum" which the Commission had required has no "reasonable relation to the purpose of preventing the advertisements from being misleading" (R. 67).[4]

Respondents' other ground of attack involved only one preparation. Paragraph 1(k) of the order prohibits respondents from advertising that Alberty's Phospho B (or Phloxo B) is of value in the treatment of sleeplessness, nervousness, irritability or sensitiveness "unless such representation be expressly limited to claims of value made for the preparation *under the principles of the homeopathic school of medicine* in the treatment

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[3] The court, in stressing the wide control over advertising which would be vested in the Commission if the present order were upheld in its entirety, ignored the fact that the Commission's power to require a statement derogating from the claims made is limited to situations in which there is reasonable basis for the Commission's determination that, without the disclosure, some material misrepresentation will be made or suggested by the advertiser's claims.

[4] While the court said that the Commission had made no finding that there would be deception in the absence of the contested disclosure (R. 67), we submit that the Commission clearly did so find. See Finding 61 (R. 46-47) referred to *supra*, p. 6.

of" such symptoms in cases in which they are due to anemia or asthenia (R. 52). Respondents sought elimination of the italicized words and the court below deleted them (R. 3, 69, 77).

The Commission found that when sleeplessness, nervousness, etc., are due to anemia or asthenia, Phospho B, according to the principles of the homeopathic school but not according to those of the allopathic school, is of value in the treatment of these symptoms (R. 43). On this branch of the case the court of appeals briefly said that it did not think that it was misleading to fail to designate "which of two established schools of medicine recognizes a product as beneficial" (R. 68).

Judge Bazelon, dissenting, expressed the view that the Commission's order should be upheld in its entirety (R. 69-77).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In modifying the order of the Federal Trade Commission by striking from paragraph 1(d) the clause "and unless the advertisement reveals that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it," and by striking similar clauses from other paragraphs of the order.

(2) By striking from paragraph 1(k) of the Commission's order the phrase "under the principles of the homeopathic school of medicine."

(3) In failing to affirm the Commission's order in its entirety.

REASONS FOR GRANTING THE WRIT

Congress has explicitly provided in Section 15(a) of the Federal Trade Commission Act that an advertisement can be false for what it does not but should say, as well as for what it does say. The section defines a "false advertisement" as one which is "misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made *or suggested* by statement, word, design, device, sound, or any combination thereof, but also *the extent to which the advertisement fails to reveal facts material in the light of such representations* or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." In a recent case, *Donaldson* v. *Read Magazine,* 333 U. S. 178, 188-189, this Court has similarly recognized that omissions can be as misleading as affirmative misrepresentations: "Advertisements as a whole may be completely misleading although every sentence

separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead. * * * Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds."

In this case the Court of Appeals for the District of Columbia Circuit has placed limitations on the scope of Section 15(a), and of the Commission's powers in fashioning remedies for violation of the section, which are contrary to the plain terms of the statute and entirely irreconcilable with the policy of Congress in directing and empowering the Federal Trade Commission to take necessary action to prevent misrepresentations, negative as well as affirmative, in the advertising of food, drugs, devices and cosmetics. The court below has in effect held that Section 15(a) permits the Commission to concern itself only with direct and categorical affirmative representations.[5]

Respondents here have violated the statute flagrantly and extensively, both recently and in the past.[6] With respect to the advertising of the prod-

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[5] The court described the section as providing that an advertisement is misleading if it fails to reveal facts made material by "existing" representations (R. 65) or made important because of other things "claimed" (R. 66-67).

[6] Respondents have not contested the findings of the Commission setting forth gross misrepresentations as to 16 different products (see *supra*, p. 5).

As to respondents' past violations, see *Alberty* v. *Federal Trade Commission*, 118 F. 2d 669 (C.A. 9), certiorari denied,

ucts involved on this review, the Commission found that, in recommending these preparations as a cure or remedy for certain ailments, "respondents suggest not only that such ailments, symptoms or conditions may be due to causes for which the preparation is beneficial, but also that there is at least a reasonable chance that they are in fact due to such causes" (R. 46). In order to eliminate such misleading suggestion in respondents' advertising, the Commission regarded it necessary—and justifiably so, we believe—to require respondents' advertisements of these products to contain two express qualifications: (1) that the product would be beneficial only where the condition was due to specified causes, and (2) that more frequently than not, this condition is due to other causes. As Judge Bazelon, dissenting below, pointed out, the Commission would not have fully discharged its responsibility to dissipate the effects of respondents' admitted misrepresentations if it had merely insisted upon the first qualification. To quote Judge Bazelon's opinion (R. 74):

> Just as the flat statement "Oxorin is good for lassitude" requires the qualifying phrase, "when that symptom is due to iron deficiency anemia," so also might the Commission have

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314 U.S. 630. In that proceeding the Commission entered an order prohibiting misrepresentations made to induce sale of various baby foods and alleged health preparations and in review proceedings only five of the 21 paragraphs of the order were questioned, and the order was affirmed in its entirety. See Brief Opposing Certiorari, No. 104, Oct. Term, 1941, p. 3.

> concluded that this single qualification, without more, would raise the inference that, more probably than not, such a symptom *is* the result of iron deficiency anemia. To remove the possibility of this incorrect secondary inference on the part of consumers, the Commission may properly insert a second qualifying phrase.

The decision below is thus in clear conflict with the established principle that, under the Federal Trade Commission Act, the test of whether a statement is misleading is not whether it will mislead those who are "trained and experienced" but "its power to deceive others less experienced. * * * Laws are made to protect the trusting as well as the suspicious." *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 116; cf. *Donaldson* v. *Read Magazine,* 333 U. S. 178, 188-189. The Act was not "made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous." *Florence Manufacturing Company* v. *J. C. Dowd & Co.,* 178 Fed. 73, 75 (C. A. 2). "The important criterion is the net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Dist, Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (C. A. 2). In *General Motors Corp.* v. *Federal Trade Commission,* 114 F. 2d 33, 36 (C. A. 2), certiorari denied, 312 U. S. 682, the court said:

> But if the Commission, having discretion to deal with these matters, thinks it best to in-

> sist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein," it is not for the courts to revise their judgment.

See, to the same effect, *Parker Pen Co.* v. *Federal Trade Commission,* 159 F. 2d 509, 511 (C. A. 7).

The narrow construction adopted by the court of appeals is contradicted by the legislative history. Section 12(a), which makes unlawful interstate dissemination of false advertisements of food, drugs, devices and cosmetics, and Section 12(b), which makes such dissemination an unfair or deceptive act of practice within the meaning of Section 5 of the Act, were added to the Federal Trade Commission Act by the Wheeler-Lea Act of March 21, 1938.[7] The new sections prohibiting false advertisement of any food, drug, device, or cosmetic were not necessary in order to give the Commission power to prohibit such misrepresentation.[8] They

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[7] The sections had their genesis in the bill which became the Federal Food, Drug, and Cosmetic Act of June 25, 1938. That bill, as amended and reported by the House Committee on Interstate and Foreign Commerce, gave the Federal Trade Commission jurisdiction over false advertising of foods, drugs, devices and cosmetics. Dunn, *Federal Food, Drug, and Cosmetic Act,* 541-542, 566-567.

[8] Section 5 authorized the Commission to prohibit any form of misrepresentation of any commodity. For decisions upholding the power of the Commission to prohibit misrepresentation, by means of advertising, of food or drug preparations, under Section 5 as originally enacted, see *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 645-646; *E. Griffiths Hughes, Inc.,* v. *Federal Trade Commission,* 77 F. 2d 886 (C.A. 2), certiorari denied, 296 U.S. 617; *Justin Haynes & Co.* v.

were adopted so as to clothe the Commission with expanded and comprehensive powers to deal with false advertising in the food and drug field.

The report on the bill by the House Committee on Interstate and Foreign Commerce indicates the congressional purpose.[9] The report states that "we cannot ignore the evils and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements"; and that there is "urgent and manifest" need to give the Commission "more effective control" over such advertising (H. Rep. No. 1613, 75th Cong., 1st Sess., p. 4). The report further states that the advertising amendments "revolve around the definition of 'false advertisement' in section 15" and that this "definition is broad enough to cover every

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Federal Trade Commission, 105 F. 2d 988 (C.A. 2), certiorari denied, 308 U.S. 616; *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889 (C.A. 7); *Neff* v. *Federal Trade Commission*, 117 F. 2d 495 (C.A. 4); *Alberty* v. *Federal Trade Commission*, 118 F. 2d 669 (C.A. 9), certiorari denied, 314 U.S. 630.

Section 5 originally prohibited only "unfair methods of competition" and it was then necessary to show that the misrepresentation adversely affected competitors. The Wheeler-Lea Act amended the section so as to add a prohibition against "unfair or deceptive acts or practices." The effect of this change was to authorize the Commission to stop practices "unfair or deceptive to the public generally, * * * regardless of their effect upon competitors" (S. Rep. No. 221, 75th Cong., 1st Sess., p. 2). See *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149.

[9] Sections 12 to 16 came into the bill when the House Committee reported a substitute for the bill as passed by the Senate.

form of advertisement deception over which it would be humanly practicable to exercise governmental control" (*id.*, p. 5).

As previously stated, Section 15(a) provides that in determining whether an advertisement is misleading, the representations "made *or suggested*" shall be taken into account. The court below made no specific reference to the italicized words and in effect read them out of the statute. The legislative history shows that Congress deliberately inserted the word "suggested" into the law for the very purpose of reaching the type of false representation here involved.

A proposal to substitute "indicated" for "suggested" was rejected after the Congressman in charge of the bill had opposed the change upon the ground that it would narrow the prohibitions of the bill (Cong. Rec., vol. 83, p. 413). Speaking against the proposed amendment, Congressman Lea said (*ibid.*):

> This section deals with the question of advertising that is skillfully and carefully drawn to try to bait the "sucker" and deceive people. If we used the word "indicated," it carries a little narrower limitation on the execution of the act as contrasted with the word "suggested." "Suggested" involves cunningness with the idea of attracting a purchaser without being willing to state the facts. * * * We had to go far enough to include suggestions

> and get something beyond the specific, literal language embodied in the advertisement.

Section 15(a) also provides that in determining whether an advertisement is misleading, the Commission shall take into account "the extent to which the advertisement fails to reveal facts material in the light of such representations," i. e., the representations which it either makes or suggests. Congress thus evidenced its purpose that advertisements of food and drugs should be informative to the extent appropriate to repel any implied untrue representation, and it imposed upon the Commission the duty of requiring in such a case a *caveat* adequate to achieve this end. But the court below, instead of recognizing that the statutory definition was designed to supplement and amplify the Commission's power to require truth-telling in advertising, treated it as specifying limits on the Commission's power. The court said (R. 68):

> Congress has given us a definition of false advertisement and in it has specified the respects in which failure to reveal amounts to falsity. It has thus indicated, even though it has not prescribed precisely, the limits to which it meant the Commission could go. It seems to us that the limit of the Commission's power is to require that a product be truthfully represented, and that it has no power to require additional negative statements except as the act itself indicates, *i. e.*, where the affirmative

> representations *require* further explanation * * *. [Italics supplied.]

Under this interpretation, the authority given the Commission to consider "the limits to which" advertising fails to reveal a fact of material concern to potential purchasers in the light of such representations as are made or implied is converted into a bar against corrective action by the Commission unless the advertiser has made "affirmative" representations which "require" further explanation.

In contrast to the decision here, courts have consistently favored a construction of the Federal Food, Drug and Cosmetic Act and of the predecessor Food and Drug Act, which would promote the statutory objectives. Typical of these decisions is a case under the latter Act, *United States* v. *95 Barrels of Vinegar,* 265 U. S. 438, 443, where this Court said:

> Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which shall not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

The definition of Section 15(a) is practically identical with that of Section 201(n) of the Federal

Food, Drug and Cosmetic Act, 21 U. S. C. 321 (n). A letter from the Director of Regulatory Management, Food and Drug Administration, states that that agency has concluded that, if the decision in the present case stands, "it may seriously hamper and retard full and effective enforcement of the Federal Food, Drug and Cosmetic Act as it relates to the misbranding of drugs, special dietary foods and cosmetics."

The decision below is also in conflict with applicable decisions of this Court defining the limits of judicial review of the Commission's determination of the remedy requisite to prevent continuation of prior illegal practices. The controlling principles were clearly laid down in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.[10] The Court said (pp. 611-612):

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.

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[10] In that case the only question which the petition for certiorari presented was the validity of the remedy enforced by the Commission.

The Court said further (pp. 612-613):

> Congress has entrusted it with the administration of the Act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

The Commission was called upon in this case to determine what remedy was necessary in order that respondents' advertisements should no longer be false and misleading in the net impression which they are likely to make upon the general populace. On review of its order, the question presented to the court below was simply whether the Commission made an allowable judgment in its choice of remedies. We submit that Judge Bazelon, dissenting below, was clearly right in concluding that the Commission's determination was well within the wide discretion respecting the choice of remedies vested in the Federal Trade Commission (R. 69-74). In appraising the dangers of deception lurking in respondents' representations, the Commission was entitled to draw upon its "generalized experience" in dealing with cases involving the response of the general public to advertising claims. (See *Siegel* case, *supra,* at 614). In holding that the remedy here selected by the Commission bore no rea-

sonable relation to the unlawful practices found to exist, the court of appeals has placed an unwarranted limitation upon the Commission's remedial powers, which, as has been shown, is in conflict not only with the language and purposes of the Act but also with controlling decisions of this Court defining the scope of the Commission's authority.

CONCLUSION

The decision below is in conflict with principles established in applicable decisions of this Court and other courts of appeals, and it determines a question of federal law of general importance which has not been but should be settled by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 690719 730

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In The

Supreme Court of the United States

October Term, 1950

No. 131

Federal Trade Commission, *Petitioner*

v.

Ada J. Alberty, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 64-77) is reported in 182 F. 2d 36.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1950 (R. 77). Petitioners invoke the jurisdiction of this Court under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Respondents had been advertising their products broadly and without qualification as beneficial for certain conditions. The Federal Trade Commission found that the products are a remedy for those conditions when due to certain causes, but not when due to other causes which in the aggregate are much more frequent. The Commission concluded that the unqualified representations were misleading because they suggested that the products would generally correct those conditions, or at least that there was a reasonable chance they would do so. The Commission ordered respondents, if they are to continue to represent their products as efficacious for those conditions, to make two separate affirmative statements: (1) to state expressly that the claims of effectiveness are limited to those cases where the conditions are due to stated causes for which the products are an admitted remedy, and (2) *to state in addition that the conditions are due more frequently to other causes and to say that in such cases the products will not be beneficial.* Respondents did not object to the first affirmative requirement but attacked the second. The question presented is whether the Court of Appeals committed error in concluding that the second affirmative requirement has no reasonable relation to the purpose of preventing the advertisements from being misleading.

STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act (52 Stat. 111, 15 U. S. C. 45(a)), provides in part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons * * * from using unfair methods

of competition in commerce and unfair or deceptive acts or practices in commerce.

Sections 12 and 15(a) of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act (52 Stat. 114, 116, 15 U. S. C. 52, 55(a)), provide:

> Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.
>
> (b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.
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> • • • •
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> Sec. 15. For the purposes of sections 12, 13, and 14—
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> (a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied

in each instance by truthful disclosure of the formula showing quantitatively each ingredient of such drug.

STATEMENT

Respondents are co-partners engaged under the name of Alberty Food Products in advertising and selling food and drug products in interstate commerce (Fngs. 1-3, R. 33-35). Pursuant to a Commission complaint alleging that respondents had falsely advertised a number of their products in violation of the Federal Trade Commission Act (R. 5-13), and on the basis of stipulated facts (R. 15-31), the Commission entered its findings and conclusion (R. 32-47) and order (R. 48-53). The Commission found some truth and some falsity in the various advertisements, and directed cessation of certain representations.

Respondents attacked the order only as it affected four products, and then objected only to certain provisions of the order (R. 1-4). The main basis of the attack, applicable in the case of each of the four products, was that other provisions of the order to which respondents did not object are fully adequate to remedy the falsity found by the Commission, and the provisions attacked are wholly unnecessary and seriously injurious to respondents' rights to advertise their products truthfully.

The point may be illustrated by reference to one of the products, Oxorin Tablets. Respondents had been using advertisements which represented broadly and without qualification that the tablets would correct lassitude (Fngs. 16-17, R. 35-36). The Commission found that the tablets will correct the condition of lassitude when it is caused by simple iron deficiency anemia, but will not correct that condition when it is due to other causes (Fng. 19, R. 36). The Commission also found that lassitude is due much less frequently to simple iron deficiency anemia than to the other causes in the aggregate (Fng. 24, R. 37). The Commission then made an over-all conclusory finding—appli-

cable not to any single product but to the entire case—that recommendation of a preparation broadly and without qualification as a cure for a certain condition, as respondents' past advertisements had done, suggests there is at least a reasonable chance the condition is due to causes which the product will remedy. And, the Commission concluded, if "in a very substantial percentage of cases" the condition is due to other causes which the product will not correct, such a representation is false unless accompanied by an appropriate "disclosure of the possibility" of other causes (Fng. 61, R. 46-47).

The Commission ordered respondents to cease representing Oxorin Tablets as effective for lassitude unless they include in all their advertisements two separate affirmative statements. First, respondents must expressly state that the claim of effectiveness is limited to those cases where the condition of lassitude is due to simple iron deficiency anemia. Second, they must in addition expressly state "that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it" (R. 50). Respondents attacked only the second requirement (R. 1-4).[1]

The Court of Appeals held this second requirement improper on the ground that it has no "reasonable relation to the purpose of preventing the advertisements from being misleading" (R. 67). It said that the purpose of the Federal Trade Commission Act is to prevent falsity in advertising (R. 67), and the Commission does not have the authority to go further and require "additional inter-

[1]Respondents raised this question before the Commission by a petition for modification (R. 54-55), which the Commission denied (R. 57-60) with Commissioner Mason dissenting in accordance with the views expressed by him in *American Dietaids Company, Inc., et al.*, F. T. C. Docket No. 5070, CCH Trade Reg. Rep., 9th ed., Vol. 3, ¶14,006.

esting, and perhaps useful, information which is not essential to prevent falsity" (R. 68) or "to police the expenditure of the public's money or generally to do whatever is considered by it to be good and beneficial" (R. 66). The court reasoned that an advertisement containing the first affirmative statement—that is, representing only that the product will correct lassitude when that condition is due to simple iron deficiency anemia—is true as shown by the Commission's findings (R. 66-67). It concluded that a representation with such a qualification would not be misleading for failure to discuss the relative frequency of other causes for which the product is not a remedy, and that the Commission had not so found (R. 67).[2] And it held, therefore, that the second affirmative requirement has "no relation to the prevention of falsity in advertising" (R. 67).

Respondents also attacked one other provision, which applies to only one of the four products. In the case of Alberty's Phospho B the Commission required, in addition to the affirmative statements mentioned above, that respondents expressly state that the claims of value are made "under the principles of the homeopathic school of medicine" (R. 52). Respondents objected to the quoted provision. There is no evidence or finding whatsoever in sup-

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[2] Petitioner suggests that the Commission did so find (Pet. 7, fn. 4), but that is erroneous. Finding 61, to which petitioner refers, relates only to the old advertisements used prior to the order and not to advertisements qualified by the first affirmative statement. Thus the Commission found only that the old advertisements, which contained broad representations that the products would remedy certain conditions without any limitations whatsoever, suggested there was a reasonable chance that the conditions are due to causes for which the products are beneficial, and are misleading unless accompanied by an appropriate "disclosure of the possibility" of other causes (Fng. 61, R. 46-47). The Commission made no finding that advertisements containing the first affirmative statement would be misleading in any respect. Its decision to include the second affirmative requirement was based solely upon its opinion as to an appropriate remedy to eliminate the falsity in the old advertisements.

port of this requirement. The Commission found *only* that the product is of value for certain purposes according to the principles of the homeopathic school but not according to those of the allopathic school (Fng. 42, R. 42-43). It made no finding as to the relative merits of the two schools or as to the relative following of the schools among either professional people or the public, nor even any ultimate finding that it would be misleading not to inform prospective purchasers that the product is recognized as a remedy only by the homeopathic school. There is no evidence in the record on any of these points. Moreover, both the Federal Trade Commission Act (§15(c), 15 U. S. C. 55(c)) and the Federal Food, Drug, and Cosmetic Act of 1938 (§§201(g) and 201(j), 21 U. S. C. 321(g), 321(j)) officially recognize the merits of the homeopathic school by defining the term "drug" as used in those statutes to include articles recognized in the official Homeopathic Pharmacopoeia of the United States as well as articles recognized in other such official publications.

The Court of Appeals also ordered this provision stricken from the order (R. 68-69). Petitioner refers to this point in its Statement (Pet. 7-8), Questions Presented (Pet. 2, fn. 1), and Specification of Errors to be Urged (Pet. 9). It makes no attempt, however, to state any reason for granting the writ as to this point. We think it clear there is no reason and, in view of petitioner's failure to assert any, shall direct our remarks below to the other provisions in question.

ARGUMENT

Petitioner can point to none of the recognized grounds for certiorari in this case. There is no conflict between circuits, no important question of federal law which should be settled by this Court, and no decision of a federal question in conflict with applicable decisions of this Court. The court below decided merely that in the circumstances of

this case and on the findings of the Commission the first affirmative requirement is all that is reasonably necessary to eliminate the falsity found by the Commission, and the second affirmative requirement bears no reasonable relation to that purpose and is therefore not an appropriate remedy.

In this situation petitioner seeks to bring itself within the scope of discretionary review by phrasing its contentions as follows: (1) It says that the Court of Appeals has placed improper limitations upon the scope of the statute. (2) It contends that the decision is in conflict with the general principle that the Act is intended to protect "the ignorant, the unthinking and the credulous". (3) And it argues that the ruling is in conflict with decisions of this Court defining the limits of judicial review of Commission-prescribed remedies. Examination of these arguments, however, demonstrates that actually petitioner is claiming only that the court below erred in its conclusion as to the proper remedy in the circumstances of this case. In the following pages we show that all of these assertions both are erroneous and do not present appropriate reasons for certiorari.

1. **The ruling below has not placed any improper limitations on the scope of the statute.** Petitioner argues that the Court of Appeals has improperly limited the scope of Section 15(a) and of the Commission's power in fashioning remedies thereunder because the court "has in effect held that Section 15(a) permits the Commission to concern itself only with direct and categorical affirmative representations" (Pet. 10). This assertion is plainly erroneous. In its opinion the court said: "In determining whether the advertisement is misleading, failure to reveal facts made material by existing representations . . . [is] to be considered. Thus, false advertising, by the terms of the statute, includes failure to reveal certain characteristics of the product which become important . . . because of certain things which are represented in the advertisement

. . ." (R. 65). Again, the court said: "False advertising is defined by the act as including failure to reveal facts made important, or of some consequence, because of other things claimed . . . The Commission must find . . . before it can require the affirmative clause complained of . . . that failure to make such statement is misleading because of the things claimed in the advertisement. There is no such finding here" (R. 66-67).

Thus, far from holding that Section 15(a) is confined to "direct and categorical affirmative representations" as petitioner charges, the Court of Appeals expressly and consistently recognized that an advertisement may be misleading because of what it fails to say as well as because of what it says. The court pointed out, however, that in either case according to the express provisions of the statute the advertisement must be "misleading in a material respect", and the Commission cannot require affirmative statements simply because it believes they would provide helpful information which is in no way necessary to eliminate falsity. The court concluded that advertisements containing the first affirmative statement would not be misleading in any respect and therefore the second affirmative statement was wholly unnecessary as a matter of remedy.

Petitioner also complains that the Court of Appeals did not refer to the statutory word "suggested" in its opinion, and concludes that in effect the court read that word out of the statute (Pet. 15). But the court quoted in full in its opinion (R. 65) Section 15(a) of the statute, which provides that "representations made or suggested" shall be taken into account in determining whether advertising is misleading. Thereafter whenever the court used the word "representations" or "claims" it of course used the word as defined in the statute to include those either made or suggested. Obviously, when the court recognized throughout its opinion that an advertisement could be misleading because of failure to reveal facts, it at the same time was

recognizing that an advertisement could be misleading because of suggested representations. The court did not say or in any way intimate that the word "suggested" should be read out of the statute, be narrowly construed, or be interpreted in any particular way. It merely concluded that an advertisement with the first affirmative requirement would not be misleading because of anything said or suggested, or anything not said.

Petitioner also argues that the court below treated the statutory provision concerning failure to reveal facts material in the light of representations made or suggested as "specifying limits" on the Commission's power rather than amplifying that power (Pet. 16-17). But again petitioner is in error. The court merely held that the statute prohibits only advertising which is misleading and prescribes what shall be taken into account in determining whether advertising is misleading, and that the Commission has no authority to go beyond the Act and require the inclusion of affirmative statements which are not related to the prevention of falsity just because the Commission believes that such further information may be useful. Equally unfounded is petitioner's complaint (Pet. 16-17) about the court's remark "that the limit of the Commission's power is to require that a product be truthfully represented, and that it has no power to require additional negative statements except as the act itself indicates, *i. e.*, where the affirmative representations require further explanation". That statement obviously is a simple paraphrase of the statutory provision that in determining whether advertising is misleading the Commission shall consider, in addition to the representations made or suggested, whether the advertisement fails to reveal facts material in the light of such representations. The court merely said that this provision prescribes the function of the Commission and the Commission cannot go further than that and prohibit advertising which is not misleading.

Clearly the court was not seeking to state any principle of construction which would limit or narrow the provision.

It is thus clear that the decision below involves no new or important principle with respect to interpretation of the Federal Trade Commission Act. The most that petitioner is contending is that the court made a mistake in the circumstances of this case with respect to the propriety of the remedy. Such a contention provides no ground for certiorari and also, as we show later, is erroneous.

2. **The decision of the Court of Appeals is not in conflict with the statements by other courts that the Act is intended to protect "the ignorant, the unthinking and the credulous".** Petitioner asserts that the decision below conflicts with statements made by other courts that the Federal Trade Commission Act was made to protect "the trusting as well as the suspicious" and "that vast multitude which includes the ignorant, the unthinking and the credulous" (Pet. 12-13). Suffice it to say that the court below at no place mentioned or discussed these pronouncements by other courts, and in no way stated or indicated disagreement with them. All that the court concluded here was that respondents' advertisements, corrected to include the first affirmative requirement, would not be misleading in any respect and therefore the second affirmative requirement was wholly unnecessary as a matter of remedy. Manifestly it cannot be said that the decision below is in conflict with other decisions in this respect.

3. **The decision below is not in conflict with applicable decisions of this Court concerning the scope of judicial review of Commission-prescribed remedies.** Petitioner argues that the ruling of the Court of Appeals is in conflict with decisions of this Court as to the limits of judicial review in cases of this kind, and refers to the controlling principles laid down in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (Pet. 18-19). But the court below quoted the rule from the *Siegel* case that courts

will interfere only "where the remedy selected has no reasonable relation to the unlawful practices found to exist" (R. 66), followed that rule and expressly held that the remedy in this instance was improper because it bore no such reasonable relation (R. 67). Clearly the Court of Appeals has declared no principle of law inconsistent with those announced in the *Siegel* case or any other decision of this Court. Petitioner at most is asserting only that the court made a mistake in applying those principles in the circumstances of this case.

Petitioner also asserts that the only question presented by the petition for certiorari in the *Siegel* case was the validity of the remedy prescribed by the Commission (Pet. 18, fn. 10). Petitioner overlooks the fact, however, that there the Court of Appeals had held as a matter of law that it was without power to review the remedy prescribed by the Commission, and this Court granted certiorari to consider that important question of law and reversed.

4. **The decision of the Court of Appeals is correct.** It thus becomes obvious that in effect petitioner is asserting only that the decision below on the question of remedy is wrong in the particular circumstances of this case. Not only is that an inadequate reason for certiorari, but we also believe the decision below is clearly correct.

Taking Oxorin Tablets as an example, the situation found by the Commission is this. The advertisements respondents had been using prior to the order represented broadly and without any qualification that the product would correct lassitude (Fng. 17, R. 36). It is true that the tablets are a remedy for lassitude, but only in some cases (Fng. 19, R. 36). They will correct lassitude when due to simple iron deficiency anemia, but not when due to other causes which in the aggregate are much more frequent (Fngs. 19, 24; R. 36, 37). Therefore, as the Commission found, the old advertisements recommending the preparation as a cure for lassitude without any qualification were mis-

leading because they suggested to purchasers that the tablets would generally cure lassitude, or at least that there was a reasonable chance they would do so (Fng. 61, R. 46). Obviously that wrong is not to be corrected by a flat prohibition against representing the product as a cure for lassitude, because in fact it is a remedy for that condition in some cases. The problem, therefore, is to limit the representation so that it will not mislead.

That, we submit, is fully accomplished by the first affirmative requirement, which compels respondents expressly to limit their representation to the condition of lassitude when due to simple iron deficiency anemia. Such an advertisement would read:

> Oxorin Tablets will correct the condition of lassitude when that condition is due to simple iron deficiency anemia.

That statement is absolutely true and can in no way be "misleading in a material respect". The "when due" limitation clearly represents to a purchaser that the condition is not always due to that cause and that there are other causes. In fact, it meets precisely the statement of the Commission that in such a case of multiple causes the advertisement should be accompanied by a "disclosure of the possibility" of other causes (Fng. 61, R. 46-47). Such an advertisement clearly discloses that possibility. An advertisement with this qualification in no way suggests to any purchaser that his condition may be due to that cause or that the product will probably be effective in his case. It does not suggest anything as to the relative frequency of the different causes of lassitude, or that lassitude is usually due to simple iron deficiency anemia, or that lassitude is probably due to that cause, or that lassitude will probably be remedied by the product. It accurately and honestly informs the purchaser as to when the product is effective and leaves it to him either to make his own decision concerning the cause in his case, to

secure medical advice, or to try the product and determine if it brings improvement. This, it would seem, is precisely what an advertisement should do. It tells the whole truth, in no way misleads, and leaves the rest to the purchaser.

The second affirmative requirement would result in an advertisement as follows:

> Oxorin Tablets will correct the condition of lassitude when that condition is due to simple iron deficiency anemia. However, the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes, and when due to such other causes Oxorin Tablets will not be effective in relieving or correcting the condition.

Not only is such a requirement wholly unnecessary, but it ignores business realities and seriously infringes upon respondents' rights honestly to advertise their products. It should be enough if respondents accurately tell purchasers when the product will be effective, and they should not be compelled in addition to advise purchasers as to the relative frequency of causes and when the product will not be effective. The obvious result of any such requirement is to make advertising meaningless and dissuade consumers from buying products advertised for self-medication but to see their physicians. Such is not the purpose of the Federal Trade Commission Act.

Moreover, the approach followed by the Commission here imposes an impossible burden upon the advertiser in seeking to comply with the Act. When should he use the "when due" restriction, when the "frequently" statement, and when the "less frequently" limitation?[3] To obviate

[3] In the case of Alberty's Phospho B, the Commission found that there are "many other causes" (Fng. 42, R. 43), and ordered a statement that the conditions are "frequently due" to other causes (R. 52). In the case of other advertisements, not involved here, recommending Vitamin A as a remedy for inflamed eye membranes,

the last mentioned requirement, must the cause for which the product is a remedy be responsible in 25, 35, 45, or 55 percent of the cases? Or is this statement unnecessary if the particular cause is applicable in 51 percent of the cases but necessary where it applies in 49 percent of the cases? The Commission provides no answer, since it found only that the condition for which the product was recommended is due much less frequently to the cause for which the product is effective than to all other causes in the aggregate. There is no finding and no evidence concerning the relative importance of the various individual causes, the percentage of cases in which the cause in question is responsible, or whether that cause is the most important or one of the most important single causes.

The problem is further complicated by the fact that doctors often disagree as to the preponderance of various causes. Are advertisers such as respondents required in such cases to make the affirmative statements as to relative frequency and then go on to say that there is, however, a difference of medical opinion? It can readily be seen that under such requirements advertising would become so lengthy and detailed that it would seldom be read and, if it were, would have no meaning whatsoever to prospective purchasers.

The second requirement is wholly unnecessary to the elimination of falsity in the advertising. If respondents' original advertisements had been confined to a claim of effectiveness in cases of lassitude when due to simple iron

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the Commission made a similar finding that "there are many causes of inflammation of the membranes of the eye as well as Vitamin A deficiency" (Fng. 37(4), R. 40), yet in its order required only the "when due" limitation (¶1(i)(5), R. 51). In the case of Oxorin Tablets, Zen, and Vitamin A Shark Liver Oil, the Commission found that the other causes are in the aggregate much more frequent (Fngs. 24, 37(8); R. 37, 40) and in its order required the "less frequently" statement (R. 50-51).

deficiency anemia, it is inconceivable that the Commission would have complained they were misleading because of failure to state that the product would be ineffective for other causes. The result must be the same here, since the fact that the original advertisements were misleading does not entitle the Commission to adopt an expanded remedy unrelated to the elimination of falsity. It is not the function of advertising to advise purchasers as to the relative frequency of causes or when a product will not be effective, but to inform them truthfully concerning the conditions and causes for which it is a remedy. Advertisements containing the first affirmative statement accomplish that purpose and can in no way mislead. The Commission, in fact, has not found that such advertisements would be in any respect misleading (see footnote 2, *supra*). Consequently, the first requirement is all that is reasonably necessary to eliminate the previously existing falsity, and the second requirement bears no reasonable relation to that purpose and is therefore not an appropriate remedy.

The decided cases clearly support the ruling of the court below. This Court has said that orders of the Commission "should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public". *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U. S. 212, 217. It has also ruled that the courts have authority to strike provisions which bear no "reasonable relation" to the prevention of misleading advertising. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613.

The Court of Appeals for the Seventh Circuit has reached precisely the same conclusion as the court below in *United States* v. *Six Dozen Bottles, etc.*, 158 F. 2d 667, a case involving alleged misbranding under the Federal Food, Drug, and Cosmetic Act. There a part of the labeling stated that the product would provide "relief from nervousness, indigestion, upset stomach, headaches, loss

of sleep and appetite, flatulence, foul breath and coated tongue" in instances "when these troubles are due to constipation". The court said (p. 669):

> . . . by this statement the reader is informed that the remedy is only a relief from the ailments mentioned when they are due to constipation. It appears there could be nothing misleading in this statement.

Other courts of appeals have in a number of cases modified orders under circumstances parallel to those here where the Commission remedy went further than reasonably necessary to eliminate the misleading representation. See, for example, *Allen B. Wrisley Co.* v. *Federal Trade Commission,* 113 F. 2d 437 (C. C. A. 7); *Gimbel Bros.* v. *Federal Trade Commission,* 116 F. 2d 578 (C. C. A. 2); *Belmont Laboratories* v. *Federal Trade Commission,* 103 F. 2d 538 (C. C. A. 3); *Ultra-Violet Products* v. *Federal Trade Commission,* 143 F. 2d 814 (C. C. A. 9).

CONCLUSION

The decision below in no way conflicts with any decision of this Court or of another court of appeals, and decides no new question of general importance. Although petitioner has attempted to phrase its petition so as to bring it within the recognized grounds for review by certiorari, it is apparent that all of petitioner's assertions are directed solely to the point that the Court of Appeals erred in its ruling on the question of remedy in the circumstances of this case. That is not a proper ground for certiorari, and in addition it is clear that the decision below is correct. It is therefore respectfully submited that the petition for a writ of certiorari should be denied.

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